SUPREME COURT, U.S.
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No. 91-2069

In the
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED AIRLINES, INC.

Petitioner,

v.

PAUL HART, DANE VANNICE, and MILTON HOWARD,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MEMORANDUM IN OPPOSITION

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August 20, 1992

QUESTIONS PRESENTED

1. Assuming that the question is properly before the Court, did the court of appeals err by adhering to the normal rule of borrowing a limitations period from state law to govern actions under a law that does not contain a statute of limitations, and if not, what is the proper federal statute to apply?

2. If use of the most closely analogous state statute of limitations was required, was the court of appeals correct in selecting the state statute governing cases under federal statutes that do not include an express limitations period?

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MEMORANDUM IN OPPOSITION

STATEMENT

Respondents Paul Hart, Milton Howard, and Dane Vannice were employed by Frontier Airlines, Inc, until it ceased operations and filed for bankruptcy in August, 1986. At various times between November, 1987, and August, 1988, respondents applied for employment with petitioner United Air Lines, Inc., but were not hired. On September 8, 1989, respondents joined an already-pending lawsuit that had been filed by several other former Frontier employees in the United States District Court for the District of Colorado, and that alleged that United had failed to hire them in violation of section 43 of the Airline Deregulation Act of 1978, 29 U.S.C. App. § 1552. That section sought to cushion

the anticipated effects of the deregulation of the airline industry, which was expected to lead to substantial losses of employment, by, *inter alia*, requiring the remaining airlines to grant a temporary hiring preference for certain employees. Respondents and the other plaintiffs alleged that United had hired persons who did not enjoy section 43 protection instead of themselves, thus violating their first-hire rights.

Petitioner moved for summary judgment on a number of grounds, including that 13 of the 14 plaintiffs had lost their section 43 protections when they failed to accept status on a preferential hire list with Continental Airlines under a "Job Preservation Agreement" ("JPA") between Frontier and Continental, but instead accepted cash payments under the JPA. Petitioner also sought summary judgment against six of the plaintiffs, including respondent Vannice, on statute of limitations grounds; it did not, however, seek summary judgment on that ground against the remaining plaintiffs, including respondents Hart and Howard. Petitioner acknowledged that the Deregulation Act had no limitations period, but argued that the court should borrow the six-month limitations period provided by section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), for filing an unfair labor practice charge with the National Labor Relations Board. In the alternative, it argued that, if the court adhered to the rule that limitations periods are normally borrowed from state law, then the six-month period for filing administrative charges with state agencies under the Colorado Labor Peace Act or the Colorado Employment Practice Provisions should be used. Petitioner argued, among other things, that because Congress knew that the preferential hiring rights would expire in 1988, it must have intended that there be a short limitations period so that all claims under section 43 would be resolved soon thereafter.

The district court granted summary judgment on the ground that the plaintiffs (including all three respondents) had lost their claim to protection under section 43 by electing to receive cash payments rather than employment with Continental. Appendix to the Petition for Writ of Certiorari ("Pet. App.") 18a-21a. Addressing the limitations issue that had been raised with respect to respondent Vannice, the district court agreed that a six-month

limitations period was the most appropriate, but denied summary judgment on that ground because there was a genuine issue of fact regarding when respondent Vannice and others knew or should have known of their section 43 claims. *Id.* 23a-25a.

Respondents appealed to the United States Court of Appeals for the Tenth Circuit, arguing that they were protected under section 43, that the JPA governed their rights only against Frontier and Continental, and that their acceptance of cash benefits under the JPA simply mitigated their damages, and did not waive their protected status. Their brief also expressed disagreement with the district court's opinion about the six-month limitations period. Petitioner both defended the district court's JPA ruling and argued that the district court's discussion of the six-month limitations issue was interlocutory in nature and did not result in dismissal of respondents' claims, and so the court of appeals "need not address this issue." United Ct. App. Br. 15. It did not argue that summary judgment should be affirmed for limitations reasons as an alternate ground. Nevertheless, petitioner set forth its views on the limitations issue so that they could be considered "if this court were to review the District Court's decision regarding the applicable statute of limitations." *Id.*

The court of appeals reversed. It first decided that respondents had not lost their first-hire rights by opting for the cash payment option instead of the job waiting list option under the JPA. Pet. App. 4a-10a. It then turned to the statute of limitations issue, which it deemed a "not insignificant matter," *id.* 10a, albeit only for a limited time, because section 43 contains a "sunset provision that will eventually make the question moot." *Id.* n.4.

On the merits of the limitations issue, the court recited the well-established principle that, when Congress does not include a limitations provision in a federal statute, the strong presumption is that Congress intended the courts to look to analogous state limitations periods "unless they frustrate or significantly interfere with federal policies." *Id.* 12a, *quoting Reed v. UTU*, 488 U.S. 319, 327 (1989). Agreeing with the decisions of the Second and Ninth Circuits in *McDonald v. Piedmont Aviation*, 930 F.2d 220, 225 (2d Cir. 1991), and *Gonzalez v. Aloha Airlines*, 940 F.2d 1312 (9th Cir.

1991), the court stated first that there was no reason to depart from the usual rule in this situation. It rejected petitioner's contention that a national company like itself needs a limitations period of uniform length in every state in order to be able to calculate its contingent liabilities, reasoning that "[i]f this rationale were adopted there would hardly be occasion to adopt the state statute of limitations" for any federal statute. Pet. App. 13a. The court also decided that the Colorado two-year residual statute of limitations for federal claims under statutes that do not include an express limitations period was the best one to adopt, because at least one legislature had made the judgment that two years was the time period that best balanced one group of citizens' interest in enforcing their rights against another group's interest in repose. *Id.* 15a.

Petitioner has sought certiorari only on the limitations issue, and has abandoned the JPA issue in this Court.

REASONS FOR DENYING THE WRIT

I. The Limitations Issues on Which the Petition is Based (a) Do Not Present Significant Issues of Federal Law Because the Federal Cause of Action Is About to Expire Under Its Sunset Provision, (b) Are Not Properly Presented Here, and (c) in Any Event Involve an Unexceptional Application of Settled Principles in the Limitations Area About Which There Is No Significant Conflict Among the Lower Courts.

a. Petitioner asks the Court to grant certiorari in this case to consider the proper limitations period to borrow for claims brought by furloughed airline employees to enforce their first-hire rights under section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1552. The principal reason why this case does not warrant review is that the issue is about to go away. As the court of appeals noted, Pet. App. 10a n.4, and as petitioner concedes, Pet. 3 n.3, section 43(d) gives first-hire rights only to employees who were terminated before October 24, 1988. More-

over, even those employees may exercise their rights for only six years after that date, *i.e.*, before October 24, 1994. § 43(b), (e), (j).

Petitioner suggests that the issue may remain alive because bills have been introduced in Congress to extend these furlough rights; what petitioner does not mention is that such bills have been introduced for years, and that, although they have passed the House in the past, the President has routinely threatened to veto them, and the Senate has never acted on them. And in this Congress, even the House Committee has not reported them out.

If, on the other hand, Congress does pass such legislation, there is no reason to believe that the questions that the petition purports to present will need to be addressed by the Court. First, Congress might address the limitations issue in the new legislation, thus avoiding the need for the federal courts to borrow a limitations period from any other source. And, if Congress fails to speak to the issue, the limitations issue for persons covered by the extension will presumably be controlled by the Judicial Improvements Act of 1990, 28 U.S.C. § 1658, which provides that, when a federal statute is enacted after 1990 without an express statute of limitations, a four-year limitations period automatically applies.

No doubt, for statutes enacted earlier than 1991, the Court will continue to wrestle with the more general issue of how to decide which limitations period should be borrowed, when to borrow state or federal periods, and when to employ a uniform characterization of the cause of action. But the Court should choose cases in which there is a genuine, continuing controversy, whose resolution will affect the application of a heavily used statute, not a statute like section 43 which applies to only one industry and which is about to expire.

b. Even if the debate regarding the proper limitations periods for section 43 cases were sufficiently important to warrant the Court's review, this case would not be the right vehicle for resolving that question because the issue is not properly before the Court. Although both the district court and the court of appeals expressed views on that question of law, in neither court

did the resolution of the issue bear on the judgment issued by the Court, for two reasons. First, petitioner did not even move for summary judgment on limitations grounds against respondents Hart and Howard. Because petitioner did not put respondents Hart and Howard on notice that judgment might be granted against them on that ground, petitioner could not argue for affirmance on that alternate ground as to them in the court of appeals. After all, a summary judgment cannot be affirmed on a ground that the judgment winner did not raise in the district court. *Fountain v. Filson*, 336 U.S. 681, 683 (1949).

Second, the district court did not grant summary judgment even against the one respondent, Vannice, against whom summary judgment **was** sought on limitations grounds, because, notwithstanding his view of the law, the district judge found a genuine issue of fact about when respondent Vannice knew or should have known of petitioner's violation. Thus, the validity of a six-month period would not have been a ground for affirmance. Although respondents, who were not then represented by their counsel of record in this Court, did raise the limitations issue in their brief as appellants, they had no need to do so, because there was no final judgment against them on that ground. Either they were asking for an advisory opinion, or anticipating that petitioner might ask for affirmance on this ground. But petitioner did not ask for such an affirmance, and expressly acknowledged that the district court's expression of views on the proper limitations period "was interlocutory in nature." United Ct. App. Br. at 15. Accordingly, the question of what limitations period applied to respondents may not have been properly before the court of appeals, and petitioner has no basis for seeking review in this Court of the part of that court's opinion that expressed its views on the proper limitations period.

c. Nor, finally, should certiorari be granted on the theory that there have been widespread disagreements among the lower courts over section 43, or that the decision below departed from this Court's precedents. In trying to argue that the decision below conflicts with a single court of appeals ruling and "a majority of district courts," petitioner relies largely on a few district court decisions in the Ninth and Tenth Circuits which have been

overruled by their respective circuits. Pet. 11-12 n.10. Indeed, petitioner cites no district court decision of continuing validity that conflicts with the decision below. As the law now stands, the Courts of Appeals for the Second, Ninth and Tenth Circuits, joined by the District Court for the District of Columbia, have all rejected the proposition that a single federal limitations period should be borrowed for section 43 claims, and have all borrowed state limitations periods of two or three years.* Only the Third Circuit, affirming a district court decision to the same effect, has opted to look to federal law and borrow the six-month limitations period of section 10(b) of the NLRA. *Haggerty v. USAIR*, 952 F.2d 781 (3d Cir. 1992). Given both the limited amount of disagreement among the lower courts, and the small number of reported decisions that have even had to address the issue in the fourteen years since section 43 was enacted, there is simply no basis for the Court's making a place on its docket to decide the proper limitations period for a cause of action that has less than two years of effectiveness left.

There is also no basis for petitioner's contention that the lower court departed from this Court's settled precedents on the method of selecting limitations periods. Petitioner first contends that the Tenth Circuit erred in concluding that this Court's precedents provide for the adoption of a uniform statute of limitations to govern claims under a federal statute only when that statute encompasses causes of action of many types and concerning numerous topics, such that different limitations periods might be applicable, even within the same state, to different claims under the same statute. Petitioner acknowledges that this reason, which has no bearing in this case, was the basis for choosing a uniform characterization in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991), but it argues that there is another reason to seek uniformity: the need of a defendant that operates nationally to predict the time period after each refusal to hire an employee when it is protected against legal

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* *Gonzalez v. Aloha Airlines*, 940 F.2d 1312 (9th Cir. 1991); *McDonald v. Piedmont Aviation*, 930 F.2d 220 (2d Cir. 1991); *Crocker v. Piedmont Aviation*, 696 F. Supp. 685, 690-692 (D.D.C. 1988), *rev'd on other grounds*, 933 F.2d 1024 (D.C. Cir. 1991).

challenges to that hiring decision. Pet. 20.

But it is petitioner that is confused about the type of "uniformity" that is considered desirable in certain cases under this Court's limitations analysis. The Court has said that uniformity is desirable, not because a defendant is entitled to a time period that does not vary from state to state, but because all litigants, and the courts themselves, have an interest in avoiding lengthy wrangles over which limitations period ought to be selected in a particular case. Where claims under a single statute, such as RICO or 42 U.S.C. § 1983, may be based on a number of different fact patterns, each of which might evoke a different analogy to state or federal causes of actions, a court faced with a limitations question will never be sure which analogy should be followed for which subcategory of a single federal cause of action. This uncertainty, in turn, inevitably breeds litigation which increases the time and energy needed to resolve the merits of the claim. Thus, the first question in choosing a statute of limitations to be borrowed is to decide, not whether uniformity of time period is desirable, but whether uniformity of characterization of all claims under that statute is desirable. That is what the Court said in *Lampf*, and that is what it said in its other recent limitations cases. *Reed v. UTU*, 488 U.S. 319, 326 (1989); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147, 149-150 (1987); *Wilson v. Garcia*, 471 U.S. 261, 271-275 (1985).

Petitioner does not point to a single decision of this Court, or even of any lower court apart from the Third Circuit's section 43 decision in *Haggerty v. USAIR*, *supra*, holding that the "uniformity" portion of the borrowing analysis refers to the amount of time, rather than the characterization of a cause of action. Indeed, if it were a uniform amount of time that were desirable, because national defendants need to avoid uncertainty based on the different jurisdictions in which they operate, the result would be that a federal limitations period would **always** have to be borrowed.

The court below ably described this flaw in petitioner's analysis. Pet. App. 13a. Different states regularly differ in the amount of time they allow for bringing the same sort of state

causes of action; only federal limitations periods are uniform throughout the country, and yet state statutes of limitations are routinely borrowed for federal claims against defendants who operate in more than one jurisdiction. Only by choosing federal statutes could the Court ensure that claims under a particular federal statute always expire in the same amount of time regardless of the jurisdiction in which the violation was committed or in which the plaintiff lives. But such a strong presumption in the direction of borrowing from federal law would stand on their head the repeated statements by this Court in its recent limitations decisions that, in labor law as in other areas of the law, borrowing from state law is to be the norm, and borrowing from federal law the rare exception. *Id.* 14a, *quoting DelCostello v. Teamsters*, 462 U.S. 151, 171 (1983). Indeed, Congress' enactment of a four-year statute of limitations for all federal causes of action, but only on a prospective basis, 28 U.S.C. § 1658, makes clear that it is satisfied with the general use of state law for existing causes of action under this Court's well-established analysis, on which the court below relied.

But even if petitioner were correct both that a uniform characterization were appropriate, and that federal law was the appropriate source for borrowing because there was no appropriate state law analogy, that would not justify petitioner's solution of borrowing from the period of time provided by the NLRA for filing an administrative charge with the National Labor Relations Board. After all, section 43 applies only to airline employees, and labor relations in the airline industry is governed, not by the NLRA, but rather by the Railway Labor Act ("RLA"). 45 U.S.C. §§ 151 *et seq.* The RLA, in turn, has its own limitations period, and unlike NLRA section 10(b), the RLA's limitations period is two years. Section 3, First (r), 45 U.S.C. § 153, First (r). It is true that, when Congress extended the RLA to the airline industry, it did not apply section 3 of the RLA, which created the National Railroad Adjustment Board, but rather enacted separate sections, §§ 204 and 205, 45 U.S.C. §§ 184 and 185, so that the airlines would have their own separate boards of adjustment. Nevertheless, some courts have held that the two-year limitations period of section 3 First (r) applies to actions by and against airlines as well. *E.g.*, *Flight Attendants v. Republic Airlines*, 797 F.2d 352, 356-357

(7th Cir. 1986); *contra, e.g., Machinists v. Aloha Airlines*, 790 F.2d 727, 734-735 (9th Cir. 1986). In the alternative, following petitioner's suggestion that section 43 is most comparable to Colorado's age discrimination statute because one aspect of the Deregulation Act "proscribes hiring decisions on the basis of age," Pet. 29, *citing* section 43(d)(1), the best federal analogy might be to the two-year limitations period prescribed by Congress for claims under the Age Discrimination in Employment Act. 29 U.S.C. § 626(e)(1). Therefore, if the Court grants certiorari to review the decision below, respondents will argue that, if a uniform federal period is to be borrowed, it is one of these two-year periods, not the six-month period provided in the NLRA, that is appropriate, and that the judgment of the court of appeals should be affirmed on that ground.

II. The Question About What State Limitations Period Is Most Analogous Raises No Issue of Importance, and Petitioner Points to No Conflict Regarding the Ruling Below.

Petitioner also asks the Court to grant review in order to decide whether, even if the court below correctly to looked state rather than federal law for an appropriate analogy, it erred by borrowing the residual period provided by the Colorado legislature for federal causes of action that do not include an express statute of limitations. However, petitioner does not point to a single decision of any federal court -- apart from the District of Colorado in a section 43 case that has, of course, now been superseded by the decision of the Tenth Circuit here -- that rejects the use of such a residual limitations period for **any** cause of action. Indeed, petitioner identifies only four states that have such a residual period, Pet. 21, and the lower courts have routinely borrowed those states' limitations periods to govern a variety of federal causes of action. *E.g., Guy v. Swift & Co.*, 612 F.2d 383, 385 (8th Cir. 1980) (borrowing Neb. Rev. Stat. § 25-219 for actions under 42 U.S.C. § 1981); *Duncan v. Southwest Airlines*, 838 F.2d 1504, 1508 (9th Cir. 1987) (borrowing Haw. Rev. Stat. § 657-11 for fair representation action filed before *DelCostello* decision, which is not retroactive in Ninth Circuit); *C&W Constr. Co. v. Carpenters Local 745*, 687 F. Supp. 1453, 1460 (D. Haw. 1988) (borrowing

Haw. Rev. Stat. § 657-11 for LMRA section 303 secondary boycott action). Nor is any authority cited for the proposition that, in borrowing from state law, it is appropriate to borrow the time allowed for seeking assistance from a state administrative agency, as opposed to filing a lawsuit in state court.

Even petitioner does not claim that there is disagreement among the lower courts concerning the second question presented, and, in any event, petitioner's disagreements with the analysis of the court below simply do not rise to the level of a question of federal law of sufficient importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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